

BEFORE THE  
SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF A  
SUBSTANTIAL DEVELOPMENT PERMIT  
ISSUED BY MASON COUNTY TO  
EARL LINCOLN CONSTRUCTION, INC.,

ROBERT M. PAVOLKA, EDWARD P.  
DEVANEY, AND JOSEPH K. TESTU,

Appellants,

v.

MASON COUNTY, EARL LINCOLN AND  
EARL LINCOLN CONSTRUCTION, INC.,

Respondents,

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY, AND  
KENNETH O. EIKENBERRY,  
ATTORNEY GENERAL,

Intervenors.

SHB No. 81-46

PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter, the appeal of a substantial development permit  
granted by Mason County to Earl Lincoln Construction, Inc., came on  
for hearing before the Shorelines Hearings Board, Gayle Rothrock,

Acting Chairman, David Akana, A. M. O'Meara, Rodney M. Kerslake and Ronald J. Holtcamp, Members, convened at Lacey, Washington on June 16, 1982. William A. Harrison, Administrative Law Judge, presided.

Appellants appeared by their attorney Michael G. McNerthney. Respondent Earl Lincoln appeared by his attorney, Benjamin H. Settle. Respondent Mason County did not appear. Intervenors appeared by Patricia A. Hickey, Assistant Attorney General. Reporter Betty Koharski recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. From testimony heard and exhibits examined, the Board makes these

#### FINDINGS OF FACT

##### I

This matter concerns a proposal for development upon Maul Beach which is located along the Hood Canal.

##### II

The Maul family, from whom the beach derives its name, built a home there in the 1930's. In the same decade, three other homes were built on neighboring lots. The four homes were located just within the tree line around the perimeter of a horseshoe-shaped salt-water lagoon. Each home, then as now, afforded its owner a splendid view of the Hood Canal.

##### III

In the period 1959-60, land east of the site in question was subdivided into a residential development known as Cherokee Beach

Desiring a community beach access, the developers of Cherokee Beach acquired the southeast portion of the lagoon. Thereafter they filled their portion of the lagoon. This fill reduced the size of the lagoon's holding capacity and raised concerns by the other lagoon owners that their uplands would experience increased flooding. Consequently the other lagoon owners followed suit and filled their portions of the lagoon.

#### IV

From 1960 to the present time, the filled, former lagoon has remained as a level, unfenced recreation area for the families of the original four homes and the Cherokee Beach development.<sup>1</sup> The only notable improvements are a barrier of logs along the waterward edge of the fill and a small picnic shelter protecting a single picnic table on the Cherokee Beach parcel. Whereas the log barrier and height of the fill hold back the waters of the Hood Canal in summer, it is a different situation in winter. Then, on several occasions, the waters of the Canal overtop the logs and inundate the entire former lagoon to its original borders. At nearly all times during the winter, rainfall leaves portions of the old lagoon continuously in

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1. The homes involved here, from west to east are: 1) Pavolka, 2) Devaney, 3) Maul, 4) Testu, 5) Murphy and 6) McCulloch. The four original homes are Pavolka, Devaney, Maul and Murphy. Pavolka and Devaney are on waterfront lots. Testu and Murphy fee ownership abuts the waterfront community lot of Cherokee Beach. McCulloch is on a waterfront lot.

1 standing water. (The original upland area is still slightly higher  
2 than the former lagoon.)

3 V

4 In 1980, respondent Earl Lincoln Construction, Inc., (Earl  
5 Lincoln) purchased the Maul house and lot. Mr. Lincoln, an  
6 experienced real estate developer, then sought and obtained Mason  
7 County's permission to divide the Maul lot into four smaller lots.  
8 (The Maul lot contains approximately 100 feet of waterfront and is  
9 1100 feet deep.) Under this division the Maul house is located on lot  
10 number 2, with lots 3 and 4 behind it, landward, and lot 1 in front of  
11 it, within the former lagoon.

12 VI

13 In August, 1981, respondent, Lincoln, sought a shoreline  
14 substantial development permit from Mason County to place additional  
15 fill and a single family residence on lot 1 in the approximate center  
16 of the former lagoon. This residence was proposed for sale to others  
17 and not for Mr. Lincoln's personal use.

18 VII

19 The site of the proposed residence is on wetlands as that term is  
20 defined at RCW 90.58.030(2)(f) of the Shoreline Management Act of  
21 1971. The site, by virtue of its location on wetlands associated with  
22 the Hood Canal, is located upon a "shoreline of statewide  
23 significance."

VIII

The site of the proposed residence is within the Urban Residential environment to which the following pertinent provisions of the Mason County Shoreline Master Program (MCSMP) are applicable:

.16 080 Residential Development  
A. Urban Residential Environment

Nearly all of Mason County designated in this environment is already in high density use, and therefore, few areas are available for new future development of single family dwellings therein.

1. New construction shall be aesthetically compatible with the natural surroundings and not degrade existing uses.

2. Setbacks - the minimum setback for buildings shall be 15 feet from the line of ordinary high water, provided that structures shall not extend beyond the common line of neighboring structures, and new construction shall not substantially reduce the view of neighboring structures.  
(P. 29, emphasis added.)

.16.150 Landfill  
A. Urban Environment

1 Any permitted fills or shoreline cuts should be designed so that no significant damage to existing ecological values or natural resources, or alteration of local currents will occur, creating a hazard to adjacent life, property, ecological values or natural resources. (P. 44, emphasis added.)

IX

On November 2, 1981, the Mason County Board of County Commissioners, by 2-1 vote, granted a substantial development permit for 500 cubic yards of fill and a single family residence to respondent, Lincoln, at the site in question on the former lagoon.

Minutes of the County Commissioners reveal that the majority interpreted "the common line of neighboring structures" to mean a line connecting the original house (Devaney) immediately west of the Maul house with the Cherokee Beach picnic shelter located east of the Maul house. From this, appellants, who own homes bordering the old lagoon, appeal.

X

Construction of the proposed residence--which respondent describes as one story and 24' x 26'--would, if built at the common line identified by Mason County, severely reduce the waterward view of at least five neighboring structures. These are the four original homes identified as Pavolka, Devaney, Maul and Murphy, together with the newer home of Testu which is located in a gap along the horseshoe boundary of the old lagoon. The proposed residence, if located as far landward as possible on lot 1 would yet substantially reduce the waterward view of at least three neighboring structures. These are the three homes identified as Maul, Testu and Murphy. Such a severe reduction in Hood Canal view would significantly degrade a chief attribute of the existing homes' value

XI

The placement of the proposed fill, necessary to elevate the proposed residence above water in the winter, would reduce the remaining holding capacity of the old lagoon. This would result in

1 increased incidence of flooding of the adjacent uplands, and homes,  
2 especially those of Pavolka and Devaney. Their homes are located on  
3 the lowest adjacent uplands.

4 XII

5 Any Conclusion of Law which should be deemed a Finding of Fact is  
6 hereby adopted as such.

7 From these Findings the Board comes to these

8 CONCLUSIONS OF LAW

9 I

10 The shoreline substantial development permit at issue must be  
11 consistent with the Mason County Shoreline Master Program (MCSMP) and  
12 the Shoreline Management Act. RCW 90.58.140(2)(b).

13 II

14 The proposed residence may not "extend beyond the common line of  
15 neighboring structures." MCSMP .16.080 A.2. (See Finding of Fact  
16 VIII, above.) In interpreting this provision previously, we have  
17 stated that it must be used with regard to shoreline configuration,  
18 lot orientation and view. Schall and Mason County v. DOE, SHB  
19 No 78-26 and Thomas v. Mason County, Debban and DOE, SHB No. 81-3.  
20 We also stated that "the common line of neighboring structures" is a  
21 line that can be shared among the various nearby property owners  
22 Debban, supra at p. 7. In this case, the facts disclose a voluntarily  
23 created setback line adhered to by all existing homes adjacent to the  
24 old lagoon. This preserves the valuable view which each home enjoys.

1 In contrast, the isolated picnic shelter shares neither the  
2 orientation or view of the existing homes. It is not part of a line  
3 shared among the various nearby property owners. The common line of  
4 neighboring structures is a line connecting the waterward portion of  
5 the homes identified as Pavolka, DeVaney, Maul, Murphy and McCulloch.  
6 The proposed residence violates the common line provision of MCSMP  
7 .16.080 A.2.

8 Although we apply the locally adopted "common line" rule of the  
9 MCSMP in this case, the Shoreline Act itself has been applied to  
10 prohibit construction closer to the water than neighboring houses  
11 located along a voluntary setback line. DOE v. Pacesetter  
12 Construction Co. Inc., 89 Wash.2d 203, 571 P. 2d 196, at 197-198  
13 (1977). We conclude that our application of the MCSMP in this case is  
14 consistent with the Act's interpretation in Pacesetter.

### 15 III

16 The proposed residence would substantially reduce the view of  
17 neighboring structures in violation of .16.080 A.2. of the MCSMP  
18 (quoted in Finding of Fact VIII, above).

### 19 IV

20 The proposed residence and fill would degrade existing residential  
21 use in violation of .16.080 A.1. of the MCSMP (quoted in Finding of  
22 Fact VIII, above).



V

In summary, the shoreline substantial development permit authorizing the proposed residence and fill is inconsistent with the MCSMP, and should be reversed.

VI

As a consequence of this Order, respondent may seek a shoreline variance to allow construction of the proposed residence forward of the common line. In that event, respondent's own actions in creating a lot forward of the common line must be carefully evaluated in light of the prohibition of shoreline variances where hardship results from the applicant's own actions. MCSMP .28.020 B. (p. 66) and Department of Ecology WAC 173-14-150(2)(b).

VII

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

The shoreline substantial development permit granted by Mason County to Earl Lincoln Construction, Inc., dated November 2, 1981, is reversed.

DATED this 8<sup>th</sup> day of October, 1982.

SHOPELINES HEARINGS BOARD

*William A. Harrison*

WILLIAM A. HARRISON  
Administrative Law Judge

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Intervenors. )

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FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

THIS MATTER, the appeal of a substantial development permit granted  
by Mason County to Earl Lincoln Construction, Inc., having come on  
regularly for formal hearing on June 16, 1982, in Lacey, and appellants

1 appeared by their attorney Michael G. McNerthney; respondent Earl  
2 Lincoln appeared by his attorney, Benjamin H. Settle; respondent Mason  
3 County did not appear; and intervenors appeared by Patricia A. Hickey,  
4 Assistant Attorney General, with William A. Harrison presiding, and  
5 having reviewed the Proposed Order of the presiding officer mailed to  
6 the parties on the 8th day of October, 1982, and more than twenty days  
7 having elapsed from said service; and

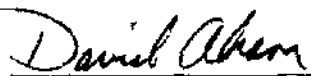
8 The Board having received no exceptions to said Proposed Order and  
9 the Board being fully advised in the premises; NOW THEREFORE,

10 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said Proposed Order  
11 containing Findings of Fact, Conclusions of Law and Order dated the 8th  
12 day of October, 1982, and incorporated by reference herein and attached  
13 hereto as Exhibit A, are adopted and hereby entered as the Board's  
14 Final Findings of Fact, Conclusions of Law and Order herein.

15 DONE at Lacey, Washington this 15<sup>th</sup> day of November, 1982.

16 SHORELINES HEARINGS BOARD

17   
18 Gayle Rothrock  
19 GAYLE ROTHROCK, Chairman

20   
21 David Akana  
22 DAVID AKANA, Lawyer Member

23   
24 Ronald J. Holtcamp  
25 RONALD J. HOLT CAMP, Member

26   
27 Rodney M. Kerslake  
RODNEY M. KERSLAKE, Member

FINAL FINDINGS OF FACT  
CONCLUSIONS OF LAW & ORDER  
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